No. 527.

IN THE

Supreme Court of the United States

October Term, 1944.

United States of America, *Petitioner*,

v.

Frankfort Distilleries, Inc.; National Distillers Products Corporation; Brown Forman Distillers Corporation; Hiram Walker, Incorporated; Schenley Distillers Corporation; Seagram Distillers Corporation; McKessen & Robbins, Incorporated; J. E. Speegle.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SCHENLEY DISTILLERS CORPORATION.

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Press of Byron S. Adams, Washington, D. C.

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SCHENLEY DISTILLERS CORPORATION.

Schenley Distillers Corporation, the respondent, submits that the decision below correctly construes the allegations of the indictment and properly applies thereto the applicable laws of Colorado and that no reason exists under the rules for granting the petition for writs of certiorari.[1]

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[1] Emphasis ours unless otherwise noted.

OPINIONS BELOW.

On March 12, 1942, an indictment in two counts was returned in the Colorado district, charging the respondents with an alleged violation of the Sherman Antitrust Act, 15 U. S. C. A. 31, *et seq.* The government elected to stand on Count 2, and Count 1 was quashed. Demurrers were overruled (R. 53). To facilitate review of the law with respect to the sufficiency of the indictment, a stipulation and consent to severance was entered into between the defendants and the United States. Under the terms of this stipulation, certain defendants changed their pleas from not guilty to *nolo contendere;* sentences were imposed upon them and the present separate appeals were filed by said defendants from the judgment of the court below.

The appeals were argued and submitted January 18, 1944 to Judges Phillips, Bratton, and Murrah, of the Tenth Circuit Court of Appeals (R. 101). On February 28, 1944, in a unanimous opinion, the indictment was held insufficient and judgment was entered ordering the cause remanded to the District Court with directions to dismiss the indictment (R. 101). The first opinion of the court is not reported. That opinion was rendered with reference solely to the Colorado indictment now before this court, and we have therefore printed the same as "Appendix F" to this brief. On March 10, 1944, the court, of its own motion, set this cause for reargument, *limited*, however, to the question of whether the second count of the indictment charges the offenses set out with sufficient particularity (R. 104). The reargument was held jointly with the reargument of the indictments returned in Kansas against the Safeway and Kroger Grocery Companies on April 24, 1944 (R. 104-105). The reargument was before the full bench of four judges (Phillips, Bratton, Huxman and Murrah).

On August 26, 1944, a second opinion was rendered which was substituted for the first opinion printed herewith as "Appendix F". The second opinion deals jointly with the

Colorado indictment involved herein against the distillers, et al, and the Kansas indictments against Safeway and Kroger Grocery Companies. A large part of this opinion is not relevant to any question presented by the petition for writs of certiorari, but in the concluding portion of the opinion, commencing with the second paragraph on page 115 of the record, the court discusses the insufficiency of the Colorado indictment in view of the distinctive laws of the State of Colorado and reaches the unanimous conclusion that in view of such laws, the indictment fails to set forth a federal misdemeanor within the scope of the anti-trust laws.

In this respect, the four judges, upon reargument, came to the same conclusion arrived at by the three judges originally. Thus the court was unanimous in all respects upon the questions presented by the petition for writs of certiorari. The dissenting opinions of Judge Phillips and Judge Vaught (R. 119, R. 122), relate solely to the Kansas indictments against the Safeway and Kroger Grocery Companies which were upheld. The questions involved in the grocery indictments are entirely disassociated from the questions presented by the government's petition for writs of certiorari as to the Colorado indictments.

QUESTIONS PRESENTED.

We respectfully submit that the questions set forth in the petition for writs of certiorari are too broadly stated and that such questions are not presented by the Colorado indictment. The Circuit Court of Appeals did not find such questions necessary to its decision, and we submit that the same are not appropriately presented for review here upon the present record. We further submit that the questions involved in the present case are local and arise under the distinctive laws of Colorado relating to domestic sales of intoxicating liquors within state limits. The indictments, although of concern to the particular defendants, present no question of general interest and no other similar cases are pending.

Our reasons for stating that the questions set forth in the brief of the Government (p. 2) are not presented by the record in this cause are apparent from an examination of the indictment and the construction thereof by the court below. The brief sets forth three questions. In none of the three questions presented is the court advised that the "commodity" involved is intoxicating liquor. However, that fact considerably changes the questions presented because under the Twenty-first Amendment to the Federal Constitution, the Wilson Act,[2] the Webb-Kenyon Act[3] and the Collier Act[4] (which re-enacted the Webb-Kenyon Act[3]) the several states of the Union are permitted to exercise exclusive jurisdiction over purely intra-state traffic in intoxicating liquors and are granted a much greater control "over interstate liquor traffic than over commerce in any other community"[5]

The Federal Government has jurisdiction under the revenue laws and under the Federal Alcohol Administration Act, over the manufacture, labeling and interstate transportation of intoxicating liquors,[6] but broad considerations of national and state policy have combined to permit exclusive local state regulation of retail sales and consumption.

Further, the questions as presented omit to state that under the distinctive laws of the State of Colorado all interstate transportation and commerce in intoxicating liquors necessarily ceased and forever ended when the liquor crossed the state line and came to rest in the warehouse of a Colorado licensed wholesaler. Title thereupon

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[2] 26 Stat. 313 (1890); 27 U. S. C. A. § 121.

[3] 37 Stat. 699 (1913); 27 U. S. C. A. § 122.

[4] 49 Stat. 877 (1935); 27 U. S. C. A. § 122.

[5] *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941).

[6] *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), pp. 138-139; *State Board of Equalization of California* v. *Young's Market Co.*, 299 U. S. 59 (1936), p. 63; *In Re Rahrer*, 140 U. S. 545 (1891), p. 560; *Pabst Brewing Company* v. *Crenshaw*, 198 U. S. 17 (1905), p. 27; *Premier-Pabst Sales Co.* v. *McNutt*, 17 F. Supp. 708 (D. C. Ind. 1935) 708

passed to such wholesale dealer. Thereafter, the liquors were commingled with all other similar property in the state and could not under the laws of Colorado be sold or shipped out of the state. Such intoxicating liquor could only be sold to a Colorado licensed retail dealer and by him to a Colorado consumer.[7] *The conspiracy alleged in the indictment related only to the retail sale by the duly licensed Colorado retailer, under Colorado laws, to a Colorado consumer, in accordance with the policy of the State of Colorado.* And it related *only* to the *percentage of the retail mark-up in accordance with the Colorado Fair Trade Law and the Colorado Unfair Practice Act after all interstate commerce had, as a matter of law and fact forever ended.*

Nor do the questions as presented in the petition for writs of certiorari advise the court that the commodity involved, to-wit, intoxicating liquor, was a commodity which *bore the trademark, brand and name of the producer and that such branded merchandise was in open competition with branded merchandise of the same general class produced and distributed by others.*

The second question as presented refers to an alleged conspiracy to subject a commodity in interstate commerce "to agreements to maintain the resale price on *intra*-state sales of the commodity" without stating that such agreements to maintain the resale price *were Fair Trade contracts made in accordance with and under the statute law and public policy of the State of Colorado in which such resale was alleged to have been made and to which the commodity was transported.* Such agreements are specifically exempted from the Sherman Anti-trust Act by the Miller-Tydings Amendment.

The third question as set forth makes similar omissions and fails to state that the so-called "price fixing agreements" were the very Fair Trade agreements authorized

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[7] Colorado Liquor Rules and Regulations (1937) Regulation 12 C.

and encouraged by the statute law and policy of the State of Colorado. In like manner, the first question as presented does not state that it has to do with the efforts of the retailers to maintain and enforce the "fair trading" of the commodities involved in accordance with the laws and policy of the State of Colorado.

When these omissions are supplied the entire character of the questions presented by the indictment is changed. When we know (1) that the commodity involved is intoxicating liquor (2) that only the retail sale thereof by a Colorado licensed retailer to a Colorado consumer is involved (3) that only the percentage of mark-up on the retail price was involved, long after interstate commerce had ended, (4) that a mark-up was legally compelled by the Colorado "Unfair Practices Act"[8] and was embodied in the fair trade contracts authorized by the Colorado "Fair Trade Law"[9] and by the "Liquor Code"[10] of Colorado, it then *becomes clear that the questions involved in this case are not federal questions and are outside the jurisdiction of the federal government under the Sherman Anti-trust Act.*

It can hardly be claimed that questions concerning the efficacy and wisdom of the Unfair Practice Act of the State of Colorado, which requires certain fixed elements to be taken into consideration in determining the retailer's mark-up and which forbids destructive price cutting, are federal questions. Nor can it be successfully claimed that questions concerning the wisdom of the policy of Colorado in providing for Fair Trade contracts under the Colorado Fair Trade Law, and in making the price thereunder uniform for such item throughout the state and in prohibiting the cutting of that price by drastic criminal penalties under appropriate provisions of the Liquor Code, are federal questions.

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[8] Colorado Session Laws (1937), Chapt. 261.

[9] Colorado Session Laws (1937), Chapt. 146.

[10] '35 C. S. A. c. 89.

Nowhere in the statement of the questions presented, in the accompanying argument or in the indictment is it alleged that the agreements fixing the retailer's resale price have in anywise obstructed or impeded interstate commerce. *It is not claimed that the quantity or quality of intoxicating liquor shipped into the State of Colorado has been in anywise diminished.* While it is argued that the "necessary consequences" thereof must be to reduce consumption, that fact is not alleged and the argument disproves itself. One of the soundest economic reasons for authorizing and encouraging Fair Trade contracts is to *maintain sales* and *prevent destructive competition* which *disrupts consumer markets and in the end results in destroying commerce.* Hence, it must be presumed that the experience of the State of Colorado has convinced the people thereof that the maintenance of fixed and uniform prices for each of the several competitive brands of intoxicating liquors sold in that state *increases the quality and promotes consumer confidence and increases sales.* Therefore, insofar as the present indictment is concerned, there is no allegation and no sound argument to show that the acts complained of had any adverse effect upon interstate commerce in intoxicating liquors.

THE QUESTIONS PRESENTED RELATE EXCLUSIVELY TO INTRA-STATE COMMERCE GOVERNED BY THE LAWS OF COLORADO.

The Circuit Court of Appeals was unanimous in its conclusion that Count 2 of the indictment related exclusively to intrastate commerce which was within the exclusive jurisdiction of Colorado, and that Colorado had adopted specific laws occupying the field involved. In so holding the court said (R. 116):

> "But a combination or concert limited in its objectives to intrastate activities, with no intent or purpose to effect interstate commerce, is without the reach of the

> Act, even though there may be an indirect and insubstantial effect on interstate commerce."[11]
> "Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated 1935."

The court then analyzes the above acts and points out that under the Colorado Fair Trade Act it is lawful to provide by contract for the sale or resale of a commodity bearing the trademark, brand or name of the producer, at a fixed minimum price and unlawful to resell at less than the minimum prices stipulated by the seller. Necessarily such contracts result in a uniform retail price for the same brand at all retail outlets, but the brands of one distiller or producer are in open competition with the brands of all other distillers or producers. The fact that each distributor of branded merchandise stipulated with the retail dealer for a fair trade price for his particular brand did not result in a uniform price for all brands—on the contrary, it resulted in competitive prices for all brands. The indictment does not allege that there was any *uniform* price. The indictment does not allege any lack of competition between distillers and producers in the sales of their merchandise to wholesale dealers in Colorado. No such allegation could truthfully be made in view of the well known fact that the most intense competition existed between the various distillers and producers of intoxicating liquors. After the goods came to rest in Colorado the wholesalers sold the same to retailers who in turn added the retail mark-up to the invoice price before selling the same to the consumer. It is alleged that this retail mark-up was fixed by Fair Trade contracts. The fact that such Fair Trade contracts established a uniform price for the sale of the

[11] Citing *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert*, 265 U. S. 457; *Industrial Assn.* v. *United States*, 268 U. S. 64; *Levering & Garriques Co.* v. *Morrin*, 289 U. S. 103.

same brand at retail throughout the state was not in restraint of trade or competition but was in accord with the very purpose and intent as well as the express language of the uniform Fair Trade Act adopted by Colorado and by a great majority of the states of the Union. While such contracts established a uniform price for the sale of the same brand in different retail stores the result of adding the retail mark-up to the wholesale prices of the various brands of merchandise which were sold at different and competitive prices by wholesalers to retailers *was to increase the margin of difference in such prices, which emphasized the competition between brands.*

The court further analyzed Section 3 of the Unfair Practices Act, pointing out that such act makes it unlawful for anyone to sell, give or advertise any product for less than the cost thereof to the vendor, donor or advertiser with intent to injure or destroy competition. "Cost" is further defined to include in addition to the invoice cost the cost of doing business or overhead expenses, which "must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising" (Unfair Practices Act, Sec. 3(b)). Since the elements of cost are more or less standardized the Colorado Law requires a reasonably uniform percentage of mark-up.

The court further points out that Section 17 of the Liquor Code as amended by Chapter 160, Laws of 1941, makes it unlawful to advertise or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, and also authorizes the licensing authority to make rules and regulations pursuant to the licensing provisions. Regulation 1 (3) promulgated under the Liquor Code provides that all spirituous liquor sold or

transferred within the state must be affixed with the proper stamps before sale or transfer, and wholesalers shall affix the stamps on all liquor sold by them within the state to retailers or consumers prior to delivery. Regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale dealer, "at the time such liquor crosses the state line coming into the state for the purpose of being sold or used there."

The court then continues (R. 117):

> "These statutes and regulations are emphasized as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in *Washington Brewers Institute v. United States, supra,* that the failure of any state to appear as a friend of the court to protest the enforcement of the Sherman Act, was significant, the attorney general of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United States, and that they are subject exclusively to the control and operation of the law of Colorado.
>
> "The agreement as pleaded in the indictment in this case was essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, supra, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line coming into the state, and the required stamps must be affixed by the wholesaler. When it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is com-

mingled with other merchandise, it ceases to be an integral part of interstate commerce.[12] * * *

And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. * * *

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But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or by fair inferences is to be found in the indictment."

Finally, the court discusses the allegations that retailers agreed to patronize only producers and wholesalers who entered into fair trade contracts and to boycott producers and wholesalers who supplied their products to retailers who violated the laws of Colorado by refusing to observe the prices set forth in such fair trade contracts, and said:

"But the words 'patronize' and 'patronage' as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Sherman Act for the reason that retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are exclusively intrastate transactions.

The second count is completely barren of any allegations of fact effectively charging that the combination

[12] Citing *Industrial Ass'n.* v. *United States, supra; Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572; *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202; *Jax Beer Co.* v. *Redfern*, 124 F. (2d) 172; *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778; *Allesandro* v. *C. F. Smith Co.*, 136 F. (2d) 75.

and agreement was one directly and substantially to restrict or burden the free and untrammeled flow of interstate commerce. The combination as pleaded was one necessarily intended to affect only intrastate activities. Its sole objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Sherman Act."

THE CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAWS OF COLORADO.

The laws of Colorado which govern and regulate the sales of liquor in that state are:

Article XXII of the Colorado Constitution, repealing the intoxicating liquor laws;[13]

Article XXIV, Sec. 2 (b) of the Colorado Constitution, allocating 85% of the net revenue from liquor to the State Old Age Pension Fund;[14]

Chapter 89 of the Colorado Statutes Annotated, 1935, being the Colorado Liquor Code;[15]

Chapter 146, Session Laws of Colorado, 1937, being the Colorado Fair Trade Act;[16]

Chapter 261, Session Laws of Colorado, 1937, being the Colorado Unfair Practices Law;[17]

Chapter 160, Session Laws of Colorado, 1941, being the application of the Fair Trade Acts to the Colorado Liquor Code.[18]

When Article XXII of the Colorado Constitution, repealing state prohibition, was adopted by the people on November 8, 1932 it was necessary for the state to enact a new code of liquor laws which was enacted the following year

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[13] See Appendix A, p. 22.

[14] See Appendix B, p. 22.

[15] See Appendix C, p. 22.

[16] See Appendix D, p. 25.

[17] See Appendix E, p. 27.

[18] Liquor Code §3 (t).

and is Chapter 89, Colorado Statutes Annotated, 1935. This code sets up complete machinery for licensing and regulating the sale, use and consumption of liquors, wines and beer, both wholesale and retail, within the State of Colorado and also levies an excise tax thereon evidenced by liquor stamps which can only be sold to a manufacturer or a wholesaler. The code makes the wholesaler liable for payment of the tax in the first instance and it is unlawful for them to sell liquor for retail sale without first affixing the stamp to the container. The stamp must remain uncancelled. The cancellation must be done by the retailer dealer immediately upon receipt of the article. Thus, it is through control of the sale of liquor by the wholesaler that the state is able to enforce its police regulations and to collect its current excise revenue. In the court below the Attorney General of Colorado intervened as *amicus curiae*, and called the court's attention

> "to the fact that in Colorado, liquor sales constitute one of the chief sources of revenue, ear-marked for the benefit of our old age pensioners and that the system in Colorado providing for the collection of that revenue is built up around an absolute control by the state over manufacturers (brewers and distillers) and wholesale importers. In other words, so far as the instant cases are concerned, practically all spirituous liquors sold in Colorado are imported by wholesalers. The state looks to and holds the wholesaler accountable for the payment of the state excise taxes thereon. Colorado, therefore, has a direct interest insofar as its police regulations and state revenue are concerned in the sale of liquor within its borders, which is all embracing and of necessity includes *both the wholesale and retail price thereof*."

The Attorney General further pointed out in his printed brief in the court below (p. 4) that:

> "In addition to the Liquor Code, the State Legislature in 1937, enacted two statutes designed to *stabilize retail prices* on commodities throughout the State and

> to protect the retail trade from unscrupulous and *destructive price cutting practices.*"

He referred to the Fair Trade Law and the Colorado Unfair Practices Law and then continued:

> "As heretofore pointed out these Acts were deliberately designed to fix and stabilize minimum retail prices of commodities within the State of Colorado. We assume that the right of the State of Colorado to enact the same, as well as the fact that prices so fixed upon commodities in intrastate business, are excluded from the operation of the Sherman Act, has been too well established to require further argument."

The Attorney General then quoted the amendment to the Liquor Code, passed by the Colorado Legislature in 1941 [Sec. 17, Chapter 89, 1935, Subsection (t)] making it a criminal offense to sell, offer for sale, or advertise intoxicating liquor "at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act . . ." The Attorney General then said:

> "The 1941 amendment, supra, was enacted so as to clarify any doubt but that retail liquor sales in the State of Colorado could lawfully be made the subject of fair trades contract for minimum price and thus bring the retail liquor dealers within the provisions of the Fair Trade Act, the same as the druggist or other retail merchant handling and dispensing imported standard branded products.
>
> "We have detailed these state laws, as hereinabove set forth, in order to demonstrate how completely the legislative field in that direction has been occupied by State legislation and accordingly we submit that having so occupied the field, the State has assumed complete and exclusive jurisdiction thereof." Citing *W. J. Meredith et al.* v. *City of Winter Haven*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 1 (1943).

In conclusion, the Attorney General pointed out the evil result which would necessarily flow if the Federal Anti-

Trust Division attempted to regulate the *retail pricing* and *sales of intoxicating liquor in Colorado under Federal anti-trust laws.* He said:

> "In conclusion, therefore, let us say that if the appellants acting under the authority of Colorado law have made contracts legal and binding within the State of Colorado (*as appears to be the recorded fact in these appeals*), and they now, because of their observance of such contracts, are guilty of violating the Sherman Anti-Trust Law, *the Colorado Fair Trade Practices Act is nullified* and *the state's control and regulation of its intra-state liquor traffic is crippled, if not destroyed.*
>
> "Furthermore, anything which tends to lower liquor sales in Colorado will directly affect the State Excise Revenue derived therefrom and if the sale of liquor within Colorado is to be thrown open to unrestricted and uncontrolled wholesale competition, its *legitimate revenues must decrease* and the ground is tilled and fertilized from which the bootlegger and his illicit brew must inevitably spring.
>
> "We submit, therefore, that sales contracts made by virtue of our Colorado laws are exclusively under the control of the State of Colorado, and, so far as the contracts themselves are concerned, they have been removed from federal regulation and control."

The brief of the Government[19] alleges that it is "immaterial that *the indictment in the present case does not allege a purpose to destroy or injure the interstate trade*" involved. The argument is that the alleged refusal to purchase goods which are not protected by Fair Trade contracts must have the necessary effect of restraining interstate trade and depriving producers of a market. No such inference as to such consequence can arise in view of the settled policy of forty-five states of the Union, which have passed Fair Trade Laws and of the National Government in recognizing the validity of such policy and laws in the Miller-Tydings Amendment to the Sherman Anti-Trust

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[19] p. 10.

Law. These laws recognize that unrestrained price cutting is injurious to the manufacturer, distributor, retailer and general public. This is especially true as to liquor where price wars for a time stimulate excessive use of intoxicants with all the social problems resultant therefrom and finally result in destroying the commerce and the market for such goods. Colorado recognized that fact by providing criminal penalties of a fine up to $5000.00 or imprisonment up to one year, or both, for violation of Fair Trade contracts *in sales of alcoholic beverages.* New Mexico, Kentucky, Arizona, Arkansas, California, Florida, and Georgia have expressed the same policy by providing that whereas other trademarked commodities *may* be covered by Fair Trade contracts, liquor *must be sold only under Fair Trade contracts.*[20] Other states such as Rhode Island, Indiana, New Jersey, and Kentucky, regulate the retail markup and even fix it. See *Reeves* v. *Simons*, 289 Ky. 793, 160 S. W. (2d) 149 (1942), from which we quote:

> "The proof shows that due to price cutting and to cut-throat competition by producers, wholesalers and retailers, chaos existed in the trade which resulted in law violations, excessive use of intoxicants and other conditions detrimental to the commonweal. The *evidence* is to the effect that the fixing of minimum prices has had a stabilizing effect upon the industry, done away with ruinous competition, resulted in less consumption of intoxicants by the public and has caused liquor to be sold in more wholesome surroundings." * * *
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> "* * * regulations which would be called discriminatory, arbitrary and unreasonable if applied to any other business have been upheld by the courts as a

[20] New Mexico Laws of 1939, Chapter 236;
Kentucky Statutes 2554e-1 to 12;
Arizona Liquor Control Act, Regulation 41;
Arkansas Laws of 1939, Act 352;
California Alcoholic Beverage Control Act, Section 55.5;
Florida Laws 1941, Chapter 21001;
Georgia Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquor.

reasonable exercise of the police power in restricting the liquor traffic."

We submit that the settled national policy expressed in the Twenty-first Amendment to the Constitution, as well as in the Wilson Act and the Webb-Kenyon Act, is to leave regulation of the distribution, sale and use of intoxicating liquor within a state to the exclusive jurisdiction of that state, particularly after all interstate traffic therein has finally ended. This is certainly true in the State of Colorado, which has enacted legislation completely occupying the field and regulating the distribution, wholesaling, retailing, selling and pricing of intoxicating liquor from the moment it crosses the state line and becomes domestic property in the hands of a Colorado licensed wholesaler within the state. The Circuit Court of Appeals was clearly correct in leaving the matters complained of to be dealt with by the State of Colorado and in holding that no Federal question was presented.

THE MILLER-TYDINGS AMENDMENT.

The Miller-Tydings Amendment[21] provides that Section 1 of the Sherman Act shall not apply or render illegal contracts or agreements which fix minimum resale prices of trade-marked or branded commodities, such as intoxicating liquor, when such contracts or agreements are lawful as applied to intra-state transactions under state laws or state public policy. An exception is made as to any contract between manufacturers, producers, wholesalers, brokers, factors, or retailers in competition with each other to fix minimum resale prices. The indictment in the present case does not allege any contract or agreement of any kind between producers or distiliers. Admittedly each producer sold the liquor manufactured by him to wholesale dealers in Colorado in open unrestricted competition with other producers. Thereafter, when the Colorado licensed whole-

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[21] Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. A. § 1.

saler resold to the Colorado licensed retailer in Colorado such sale was subject to a Fair Trade contract. The charge that the prices established by such Fair Trade contract were arbitrary or high, is a matter of opinion and has no relevancy to any of the questions presented. The charge in the indictment that *all* the defendants entered into Fair Trade contracts is consistent with the legally permitted vertical contract from producer to wholesaler and wholesaler to retailer. It does not suggest or allege any horizontal agreements "between producers" or "between wholesalers" or "between retailers."

It is similar to a statement that *all* baseball clubs entered into salary contracts with their ball players. This is a short way of saying that the Yankees entered into such contracts with the players on their club; that the Dodgers entered into such contracts with the players on their club, etc. It cannot be tortured into a claim that the statement charges a combination between all baseball clubs to make the same price or salary contract with each ball player.

The allegation contained in the indictment that the Fair Trade agreements were not made or carried out as "contemplated" by the Miller-Tydings Amendment is a meaningless conclusion, as nowhere are there any allegations of facts showing that these Fair Trade agreements came within in the exceptions to the amendment.

Since the Fair Trade contracts in question are *affirmatively authorized by the laws of Colorado* and therefore are within the Miller-Tydings exception to the Sherman Act, an additional reason is presented showing that the instant case presents no question under the Federal Anti-Trust Laws.

INTERSTATE COMMERCE NOT INVOLVED.

Admittedly the indictment does not charge any intent to restrain interstate commerce.[22] While the indictment speaks of a "continuous flow", that is a mere conclusion which can have no application to the facts alleged in the present case. In the case at bar Colorado was not a "throat" or "sluice" *through* which goods *moved* in interstate commerce. Colorado was a *dead end*. As a matter of both Federal law and state law, when intoxicating liquor crossed the state line and came to rest in the warehouse of a Colorado licensed wholesaler, its interstate journey was ended for all time. Thereafter the liquor could only be sold or used within the State as provided by State Law. This is admitted. It is also admitted that the only objective of the agreement referred to in the second count of the indictment was the price mark-up on the retail sale. Any agreement to fix the retail mark-up on the retail sale was exclusively a state matter. If it had any effect on interstate commerce, none is shown in the indictment. It is not alleged or claimed that the quantity or quality of liquor shipped into Colorado was diminished or impaired. If there was any incidental effect on interstate commerce it was necessarily indirect and remote and was not within the reach of the Sherman Act. In *Schechter Corp. v. United States*,[23] 295 U. S. 495, at 547 (1935), Chief Justice Hughes said:

> "The distinction between direct and indirect effect has been clearly recognized in the application of the

[22] Government Brief, p. 10.

[23] In accord:

> *Anderson v. United States*, 171 U. S. 604, 615 (1898);
> *United States v. Patten*, 226 U. S. 525, 542 (1913);
> *Konecky v. Jewish Press*, 288 F. 179, 181 (C. C. A. 8, 1923);
> *C. E. Stevens Co. v. Foster & Kleiser Co.*, 109 F. (2d) 764, 768 (C. C. A. 9, 1940);
> *Higgins v. Carr Bros. Co.*, —— Me. ——, 25 A. (2d) 214 (1942); affirmed in 317 U. S. 572 (1943);
> *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943);
> *Ewing-Von Allmen Dairy Co., Inc. v. C. and C. Ice Cream Co., Inc.*, 109 F. (2d) 898 (C. C. A. 6, 1940).

> Antitrust Act. Where a combination or conspiracy is formed with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statutes, notwithstanding its broad provisions."

In this connection it should be noted that Fair Trade Laws were enacted *before* adoption of the Miller-Tydings Amendment to the Sherman Act. In several cases when efforts were made by manufacturers or wholesalers to enforce the minimum prices provided in such contracts the defense was raised that the "*fixation of prices*" under a Fair Trade Contract affected interstate commerce and hence violated the Sherman Act. However, it was uniformly held that since the prices "fixed" related to purely *intra*state sales either from wholesaler to retailer or from retailer to consumer, there was no such direct effect upon interstate commerce as to bring the same within the reach of the Sherman Act.[24] The subsequent enactment of the Miller-Tydings Amendment was intended to exempt from the Sherman Act the making of fair trade contracts by producers or manufacturers of goods moving in interstate commerce as well as intrastate contracts.

Regardless of the character of the commodity involved, under the allegations of the indictment no direct or substantial effect on interstate commerce appears. The fact

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[24] *Seagram Distillers Corporation* v. *Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940 (1936), affirmed in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183 (1936);

Joseph Triner Corporation v. *McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936), affirmed in 299 U. S. 183 (1936);

Max Factor & Co. v. *Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177, 187 (1936), affirmed in 299 U. S. 198 (1936);

Weco Products Co.* v. *Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937).

that the commodity involved is intoxicating liquor emphasizes the point that the matters involved are purely within the province of the state and do not present a federal question.

CONCLUSION.

There is no similar situation. Examination of the issues in the cases pending in the District Courts of New Jersey and New York referred to on Page 14 of the Government's petition, clearly indicate that the facts and the laws in such cases are entirely different from those of the instant case.

In view of the fact that the case at bar deals with the distinctive laws of Colorado which were applied by the Circuit Court of Appeals in accordance with the interpretation of such laws by the proper legal authority of the state, we respectfully submit that the petition for writs of certiorari should be denied. We further submit that no federal questions are involved. There is no conflict with a decision of any other circuit. The court below properly applied the decisions of this court. The issues do not involve other defendants in other cases. We therefore submit that no reason is shown why a further review should be granted and request that the petition for writs of certiorari be denied.

Respectfully submitted,

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APPENDIX A.

COLORADO CONSTITUTION
ARTICLE XXII

"On the 30th day of June, 1933 all statutory laws of the State of Colorado heretofore enacted concerning or relating to intoxicating liquors shall become void and of no effect; and from and after July 1, 1933 manufacture, sale and distribution of all intoxicating liquors, wholly within the State of Colorado, shall, subject to the Constitution and laws of the United States, be performed exclusively by or through such agencies and under such regulations as may hereafter be provided by statutory laws of the State of Colorado; but no such laws shall ever authorize the establishment or maintenance of any saloon."

APPENDIX B.

COLORADO CONSTITUTION
ARTICLE XXIV

"Sec. 2 (b) Beginning January 1, 1937, eighty-five per cent of all net revenue accrued or accruing, received or receivable from taxes of whatever kind upon all malt, vinous, or spirituous liquor, both intoxicating and non-intoxicating, and license fees connected therewith."

APPENDIX C.

"AN ACT CONCERNING THE MANUFACTURE AND SALE OF ALCOHOLIC LIQUORS AND REPEALING CHAPTERS 5, 11, AND 12, FIRST EXTRAORDINARY SESSION LAWS OF COLORADO, 1933, AND ALL ACTS AND PARTS OF ACTS IN CONFLICT HEREWITH.

Be it Enacted by the General Assembly of the State of Colorado:

SECTION 1. This Act shall be deemed an exercise of the police powers of the State for the protection of the economic and social welfare, the health and peace and morals

of the people of this State, but no provisions of this law shall ever be construed so as to authorize the establishment or maintenance of any saloon.

SECTION 2. On and after the effective date of this Act, it shall be lawful to manufacture and sell for beverage or medicinal purposes malt, vinous or spirituous liquors, subject to the terms, conditions, limitations and restrictions contained in this Act.

SECTION 3. It shall be unlawful for any person:

(a) To manufacture, sell or possess for sale any malt, vinous or spirituous liquors, excepting in compliance with this Act.

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937. (Sub-sec. (t), Ref. Ch. 160, S. L. C. 1941.)

SECTION 4. Definitions—as used in this Act.

SECTION 23. Excise Tax. (a) An excise tax of three cents (3c) per gallon or fraction thereof on all malt liquors, three cents per quart or fraction thereof on all vinous liquors containing 14% or less of alcohol, and six cents per quart or fraction thereof on all vinous liquors containing more than 14% of alcohol by volume, and twenty cents per pint or fraction thereof on all spirituous liquors is hereby imposed, and shall be collected on all such respective liquor sold, offered for sale, or used in this State; provided, that upon the same liquors only one such tax shall be paid in this State. The manufacturer thereof, or the first licensee receiving alcoholic liquors in this State, if shipped from without the State, shall be primarily liable for such tax; provided, further, that if such liquor shall be transported by a manufacturer or wholesaler to a point or points outside of the State, and there disposed of, then in such event

such manufacturer or wholesaler, upon the filing with the State Licensing Authority of a duplicate bill of lading or affidavit showing such transaction, the tax provided herein shall not apply to such liquor, and if already paid, shall be refunded to the manufacturer or wholesaler.

(e) All alcoholic liquors manufactured in this State, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, which said stamp shall be affixed to all alcoholic liquors manufactured within this State by the manufacturer thereof before sale, or before being offered for sale, and all alcoholic liquors imported into the State immediately, upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said State, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority, and provided also that all alcoholic liquors within the State, on the effective date of this Act, shall within a reasonable time thereafter, bear an excise stamp in the proper amount as provided herein.

SECTION 25. Violations and Penalty. Any person violating any of the provisions of this Act, or any of the rules and regulations authorized and adopted under it shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not more than Five Thousand Dollars ($5,000.00) for each offense, or may be punished by confinement in the county jail for a term of not more than one year, or by both such fine and imprisonment, and the court trying such offense may decree that any license theretofore issued under the provisions of this Act or of any law relating to the sale of malt, vinous or spirituous liquors to such person operating the place of business in which said offense was committed be revoked, and may decree that no license for the sale of malt, vinous or spirituous liquors shall ever thereafter be issued to any such person convicted of such violation.

The penalties provided in this section shall not be affected by the penalties provided in any other section or

sections of this Act but shall be construed to be in addition to any and all other penalties."

APPENDIX D.

FAIR TRADE ACT

Session Laws of Colorado, 1937, Ch. 146.

"AN ACT TO PROTECT TRADE-MARK OWNERS, DISTRIBUTORS AND THE PUBLIC AGAINST INJURIOUS AND UNECONOMIC PRACTICES IN THE DISTRIBUTION OF ARTICLES OF STANDARD QUALITY UNDER A DISTINGUISHING TRADE-MARK, BRAND OR NAME.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF COLORADO:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller:

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

Such provisions in any contract shall be deemed to contain or to imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public, provided

that the owner of such stock shall give to the producer of such commodity, or to the distributor, from whom the stock was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof.

(c) When the goods are damaged or deteriorated in quality and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements.

(d) By any officer acting under the orders of any court.

SECTION 2. This Act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

SECTION 3. The following terms, as used in this Act, are hereby defined as follows:

(a) 'Commodity' means any subject of commerce.

(b) 'Producer' means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(c) 'Wholesaler' means any person selling a commodity other than a producer or retailer.

(d) 'Retailer' means any person selling a commodity to consumers for use.

(e) 'Person' means an individual, a corporation, a partnership, an association, a joint-stock company, a public trust or any unincorporated organization.

SECTION 4. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 5. If any provision of this Act is declared unconstitutional, it is the intention of the Legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect; but no part of this Act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

SECTION 6. This Act may be known and cited as the 'Fair Trade Act'.

SECTION 7. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

SECTION 8. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage."

Approved: March 15, 1937.

APPENDIX E.

UNFAIR PRACTICES ACT

(Chapter 261, Session Laws of 1937, approved and effective May 6, 1937; amended by Chapter 227, Session Laws of 1941, approved and effective April 15, 1941.)

"AN ACT relating to unfair competition and discrimination, making certain unfair and discriminatory practices unlawful, defining the duties of the Attorney General in regard thereto, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this Act a misdemeanor and providing penalties, and to repeal chapter 187, Session Laws of Colorado, 1933.

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. [*Locality discrimination prohibited.*—] It shall be unlawful for any person, firm, or corporation, doing business in the State of Colorado and engaged in the

production, manufacture, distribution or sale of any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product of commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this Act. Nothing in this Act contained shall be construed to affect or apply to any service or product sold, rendered or furnished by any public utility, the sale, rendition or furnishing of which is subject to regulation by the Colorado Public Utilities Commission or by any municipal regulatory body. This act shall not be construed to prohibit the meeting in good faith of a competitive rate. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this Act.

SEC. 2. [*Responsibility of agent.*—] Any person who, either as director, officer or agent of any firm or corpor-

ation or as agent of any person, violating the provisions of this Act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful itnent of the person, firm or corporation for whom or which he acts.

SEC. 3. [*Sales below cost prohibited.*—] It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 11 of this act for any such act.

(a) The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

SEC. 4. [*Establishing cost.*—] In establishing the cost of a given article or product to the distributor and vendor,

the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale, outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods unpurchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased and the quantity of such merchandise to be sold or offered for sale.

SEC. 5. [*Cost of survey deemed competent evidence.*—] In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

SEC. 6. [*Exceptions.*—] The provisions of Section 3, 4, and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor with (within) the meaning of this Act.

SEC. 7. [*Secret rebates prohibited.*—] The secret payment or allowances or rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this Act.

SEC. 8. [*Contract in violation of Act declared illegal.*—] Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of Sections 1 to 7, inclusive, of this Act is declared to be an illegal contract and no recovery thereon shall be had, provided, no part of this Act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

SEC. 9. [*Injunction and damages.*—] Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 1 to 7 inclusive, of this Act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this

Act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunction [injunctive] relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages if any, sustained.

SEC. 10. [*Fine and imprisonment.*—] Any person, firm, or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of section 1 to 7, inclusive, of this Act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or by imprisonment not exceeding six (6) months or by both said fine and imprisonment, in the discretion of the court.

SEC. 11. [*Constitutionality.*—] If any section, sentence, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the Act. The Legislature hereby declares that it would have passed this Act, and each section, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative.

SEC. 12. [*Purpose of Act.*—] The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

SEC. 13. [*Short title.*—] This act shall be known and designated as the "Unfair Practices Act."

SEC. 14. [*Chapter 187, Laws of 1933, repealed.*—] Chapter 187 of the Session Laws of Colorado, 1933, is hereby repealed.

SEC. 15. [*Necessity for Act.*—] The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

SEC. 16. [*Effective date.*—] In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage."

APPENDIX F.

United States Circuit Court of Appeals

TENTH CIRCUIT.

Nos. 2792-2793-2794-2795-2796-2797-2798-2799
January Term, 1944.

FRANKFORT DISTILLERIES, INC., NATIONAL DISTILLERS PRODUCTS CORPORATION, BROWN FORMAN DISTILLERS CORPORATION, HIRAM WALKER, INC., SCHENLEY DISTILLERS CORPORATION, SEAGRAM-DISTILLERS CORPORATION, McKESSON & ROBBINS, INCORPORATED, J. E. SPEEGLE, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

(February 28, 1944.)

The indictment herein containing two counts was returned against twenty-nine corporations and fifty-four individuals. The first count charges a conspiracy to raise, fix, and maintain the wholesale prices of spirituous liquor and wine shipped into Colorado, and the second charges a like conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into that state, in restraint of commerce among the several states and in violation of section 1 of the Anti-Trust Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U.S.C.A. § 1. Nineteen of the corporations are engaged in the production of alcoholic beverages outside of Colorado; eight are wholesalers engaged in the business in Colorado of purchasing alcoholic beverages for resale to retailers; one is a wholesale association whose members are wholesalers doing business in the state, hereinafter referred to as Wholesale

Association; and one is a retail association whose members are retailers engaged in busines in the state, hereinafter called Package Association. Some of the individuals are or were officers or employees of the defendant producers; some are officers or employees of the defendant wholesalers; and some are engaged in the sale and distribution at retail of alcoholic beverages in Colorado. Demurrers and motions to quash the indictment were denied. United States v. Colorado Wholesale Wine & Liquor Dealers Ass'n., 47 F. Supp. 160. Thereafter the United States elected to stand on the second count, and the first was dismissed. The defendants Frankfort Distilleries, Inc., National Distillers Products Corporation, Brown Forman Distillers Corporation, Hiram Walker, Incorporated, Schenley Distillers Corporation, Seagram-Distillers Corporation, McKesson & Robbins, Incorporated, and J. E. Speegle each entered a plea of nolo contendere and prayed that the court impose sentence in all things as though a plea of guilty had been interposed. Fines were imposed, separate appeals were perfected, and by stipulation the several appeals were presented on a single record.

The second count defines certain terms and delineates the facts with respect to the several defendants being producer, wholesaler, retailer, officer, or employee, respectively. It contains a description of the nature of the trade and commerce involved. Under this head, it sets out that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers located outside the state through wholesalers and retailers to the consuming public; that beverages shipped and sold in bottles by producers can be sold to retailers there only by wholesalers licensed under the laws of the state; that thus wholesalers and retailers are conduits through which beverages are shipped into the state and sold and distributed to the consuming public; that approximately 1,150,000 gallons of spirituous liquor produced elsewhere are shipped into the state annually for such sale and distribution; that such liquor constitutes more than ninety-eight percent of all liquor consumed within the state; that approximaely 800,000 gallons of wine produced in other states are shipped into Colorado annually for sale and distribution

to the consuming public; that such wine constitutes more than eighty per cent of all wine consumed therein; that substantial amounts of beer produced in other states are shipped into the state for sale and distribution; that alcoholic beverages are distributed to more than 700 retailers in the state by approximately 28 wholesalers; that more than seventy-five per cent of the spirituous liquor and wine and substantial quantities of the beer are sold and distributed by the defendant wholesalers; and that all of the liquor and wine, and substantial quantities of the beer, sold and distributed by the bottle or case to the consuming public, are sold by retailers, including the defendant retailers and other members of defendant Package Association. It then alleges that beginning in or about January, 1936, and continuing to the time of the presentation of the indictment, the defendants combined and conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the state, by raising, fixing, and stabilizing retail mark-ups and margins of profit; that it was a part of the combination and conspiracy that the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, that the defendant associations, wholesalers, and retailers agree upon and undertake a program to persuade, induce, and compel producers, including the defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into Colorado and to establish in and by such contracts, high, arbitrary and artificial retail prices embodying the high, arbitrary, and noncompetitive margins of profit agreed upon, that the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the association, agree with producers and wholesalers on the forms of fair trade contracts to be used by such producers and wholesalers, and prepare and circulate among its membes bulletins and notices announcing the adoption of fair trade contracts and giving the names of producers and wholesalers entering into them and also the names of those not doing so, that the defendant retailers, through the

defendant Package Association, agree to and do patronize only those producers and wholesalers who enter into fair trade contracts embodying such retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in that manner, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into such fair trade contracts, and agree from time to time with producers and wholesalers respecting revisions in the retail prices established in and by such fair trade contracts so as to preserve and maintain the retail mark-ups and margins of profit agreed upon, that the defendants, acting in part through the defendants Wholesale Association and Package Association, agree to and do police the high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, and require and secure observance of them, agree to and do employ paid executives and investigators to spy upon and embarrass retailers who fail or refuse to observe such retail prices, mark-ups, and margins of profit, and threaten to and do institute or cause to be instituted legal proceedings against retailers who fail or refuse to observe such prices, mark-ups, and margins of profits, that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling at prices, mark-ups, and margins of profit lower than those established in the fair trade contracts be deprived of the opportunity to purchase beverages from the defendant producers and the defendant wholesalers, that the defendant retailers threaten to and do boycott wholesalers and producers who supply their products to retailers failing or refusing to observe the retail prices, mark-ups, and margins of profit, that to finance such activities the defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds to be paid to the defendant Wholesale Association and that defendant in turn to pay a portion of such proceeds to the defendant Package Association, that in order to reduce price competition among retailers, defendant retailers attempt to persuade and induce the authorized officials of Colorado and of the City and County of Denver to reject applications for retail liquor licenses, and

that such fair trade agreements be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Anti-Trust Act; that the effect of the combination and conspiracy has been to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado and sold and distributed in that state at levels acceptable to and approved by the defendants, to eliminate price competition among the defendant retailers, to eliminate price competition among the members of the defendant Package Association, and to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts; and that the combination and conspiracy was entered into and carried out in part within the District of Colorado, and further that many of the acts and things were done there.

An indictment is not fatally infirm for vagueness, indefiniteness, and uncertainty if it charges all of the essential elements of the offense in such manner as to advise the accused of the nature and cause of the accusation against him, and to enable him to prepare his defense and plead the judgment of conviction or acquittal in bar to a subsequent prosecution for the same offense. Evans v. United States, 153 U. S. 584; Cochran and Sayre v. United States, 157 U. S. 286; Rosen v. United States, 161 U. S. 29; Bartell v. United States, 227 U. S. 427; United States v. Behrman, 258 U. S. 280; Wong Tai v. United States, 273 U. S. 77; Hagner v. United States, 285 U. S. 427; United States v. Safeway Stores, —— F. (2d) ——. This count charges in general language the essential elements of the offense sufficiently for such purposes. And if the means of effectuating the conspiracy are not set out with the required detail and particularity, the remedy is to apply for a bill of particulars. Glasser v. United States, 315 U. S. 60; United States v. Safeway Stores, supra.

In a case of this kind there is jurisdiction either in the district where the conspiracy was formed or in the district where some act was done pursuant to it. The allegations that the conspiracy was entered into and carried out in part within the District of Colorado and that the defendants did

within that district many of the acts charged were sufficient for jurisdictional purposes to lay venue there. Hyde v. United States, 225 U. S. 347; Brown v. Elliott, 225 U. S. 392; United States v. Trenton Potteries, 273 U. S. 392; United States v. Socony-Vacuum Co., 310 U. S. 150; United States v. Safeway Stores, supra.

The Twenty-first Amendment does not strip the national government of all authority to legislate in respect of interstate commerce in intoxicating liquor. Hayes v. United States, 112 F. (2d) 417; Washington Brewers Institute v. United States, 137 F. (2d) 964. But it does sanction the right of a state to legislate concerning the importation of such liquor from other states, unfettered by the Commerce Clause. Ziffrin, Inc. v. Reeves, 308 U. S. 132; Cf. Carter v. Virginia, —— U. S. ——. In this connection, Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated of 1935. Under section 1 of the Fair Trade Act a contract relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or distributor, and which commodity is in free and open competition, shall not be deemed in violation of any law of the state by reason of providing that the buyer will not resell such commodity at less than the minimum price stipulated by the seller or that the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not resell at less than the minimum prices stipulated by the seller. Section 3 of the Unfair Practices Act provides that it shall be unlawful for anyone engaged in business in the state to sell, offer for sale, or advertise for sale, any article or product for less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition. Section 17 of the Liquor Code, as amended by chapter 160, Laws of 1941, makes it unlawful wilfully and knowingly to advertise, offer for sale, or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions

of the Fair Trade Act; section 29 provides for a manufacturer's license, a wholesaler's license, and a retail liquor store license; and section 20 authorizes the licensing authority, created by the preceding section, to make rules and regulations pursuant to the licensing provisions. Regulation 1 (3) promulgated under the Liquor Code provides that all spirituous liquor sold or transferred within the state must be affixed with the proper stamps before sale or transfer, and that wholesalers shall affix the proper stamps upon all liquor sold by them within the state to retailers or consumers prior to delivery; and regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale dealer, as defined in the Liquor Code, at the time such liquor crosses the state line coming into the state for the purpose of being sold, offered for sale, or used there. Appellants point with emphasis to these statutes and regulations as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in Washington Brewers Institute v. United States, supra, that significantly no state had appeared as a friend of the court to protest the enforcement of the Anti-Trust Act, the Attorney of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United States, and that they are subject exclusively to the control and operation of the law of Colorado.

Aside from the diminution pro tanto which may be found in the Twenty-first Amendment in respect of the transportation of intoxicating liquor, Congress has plenary power under the Commerce Clause to regulate commerce among the several states. And that power is not confined in all cases to the regulation of interstate commerce. It extends in sweep to intrastate activities which affect interstate trade or the exercise of the power of Congress over it in such

manner as to make the regulation of them necessary or appropriate for the protection of the free flow of interstate commerce. United States v. Darby, 312 U. S. 100.

A combination or agreement for price maintenance or which operates directly on prices or price structures of commodities moving in interstate commerce constitutes an unreasonable restraint within the Anti-Trust Act, without regard to whether the prices or price structures agreed upon are reasonable or otherwise, United States v. Trenton Potteries, supra; Ethyl Gasoline Corp. v. United States, 309 U. S. 436; United States v. Socony-Vacuum Oil Co., supra; United States v. Masonite Corp., 316 U. S. 265; one not fixing prices but intended unreasonably to restrict or restrain interstate commerce or which by its operation necessarily impedes the due course of such commerce comes within the act, Coronado Coal Co. v. United Mine Workers, 268 U. S. 295; one which contemplates restraint of interstate trade but to be effectuated by acts constituting intrastate activities is met with the condemnation of the act, Bedford Cut Sone Co. v. Journeymen Stone Cutters' Ass'n., 274 U. S. 37; Local 167, International Brotherhood of Teamsters v. United States, 291 U. S. 293; and one primarily local likewise finds itself within the ambit of the act if the means adopted to effectuate it operate to lay a direct and undue burden on interstate commerce, Industrial Ass'n. v. United States, 268 U. S. 64. But a combination or concert, express or implied, limited in its objectives to intrastate activities, with no intent or purpose to affect interstate commerce, is without the reach of the act, even though there may be an indirect and insubstantial effect on interstate commerce. United Mine Workers v. Coronado Coal Co., 259 U. S. 344; United Leather Workers v. Herkert, 265 U. S. 457; Industrial Ass'n. v. United States, supra; Levering & Garrigues Co. v. Morrin, 289 U. S. 103.

The gist of the offense charged in the second count is the agreement or confederation, in violation of the Anti-Trust Act. Dealy v. United States, 152 U. S. 539; Williamson v. United States, 207 U. S. 425; Braverman v. United States, 317 U. S. 49; United States v. Safeway Stores, supra. And the offense cannot be charged in the general language of the statute. The indictment must descend to particulars and charge

the constituent ingredients of which the offense is composed. It is not enough to charge in general language that a conspiracy was formed to raise, fix, and maintain retail prices, by raising, fixing, and stabilizing retail mark-ups and margins of profit, in restraint of commerce among the states. A general charge of that kind in the language of the statute would not suffice. United States v. Safeway Stores, supra.

Obedient the necessity of doing so, the indictment descends to particulars and undertakes to charge the essential elements of which the offense is composed. But the agreement as pleaded is essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, supra, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line coming into the state, and the required stamps must be affixed by the wholesaler. And when it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is commingled with other merchandise, it ceases to be an integral part of interstate commerce. Industrial Ass'n. v. United States, supra; Walling v. Jacksonville Paper Co., 317 U. S. 564; Higgins v. Carr Bros. Co., 317 U. S. 572; Jewel Tea Co. v. Williams, 118 F. (2d) 202; Jax Beer Co. v. Redfern, 124 F. (2d) 172; Walling v. Goldblatt Bros., 128 F. (2d) 778; Allesandro v. C. F. Smith Co., 136 F. (2d) 75. And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. Jewel Tea Co. v. Williams, supra.

The control of the handling, the sales, and the prices at the point of origin before movement in interstate commerce begins, or in the state where it ends, may in some circumstances directly and unduly burden interstate commerce. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373; Local 167, International Brotherhood of Teamsters v. United States, supra. But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers

or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or remote is to be found in the indictment.

True, it is charged that it was part of the agreement that the retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so; that the retailers agree with the producers and wholesalers that retailers selling at prices lower than those established in the fair trade contracts be deprived of the opportunity to purchase from the defendant producers and wholesalers; and that the defendant retailers threaten to boycott and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe such retail prices, mark-ups, and margins of profits. But the words "patronize" and "patronage" as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Anti-Trust Act for the reason that, as previously said, retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are intrastate transactions.

The second count is completely barren of any allegations of fact effectively showing that the combination and agreement operated directly and substantially to restrict or burden the free and untrammeled flow of interstate commerce. The combination as pleaded was one intended to affect only intrastate activities. Its objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Anti-Trust Act.

The judgments are severally reversed and the causes remanded with direction to dismiss the indictments as to these appellants.